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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 973.

ROBERT P. BARRY, PLAINTIFF IN ERROR,

vs.

E. G. EDMUNDS, TREASURER OF FAUQUIER COUNTY, VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 25, 1885.

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1 *Trespass on the Lease.*

In the Circuit Court of the United States for the Eastern District of Virginia.

ROBERT P. BARRY
vs.
E. G. EDMUNDS. } No. 1496.

Be it remembered that heretofore, to wit, on the 30th day of July, A. D. 1885, came the plaintiff, by Wm. L. Royall, his attorney, and sued out of the clerk's office of the circuit court of the United States for the district aforesaid a summons against the above-named defendant, which summons, together with the marshal's return thereon, is as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Eastern District of Virginia*, } *ss:*

The President of the United States of America to the marshal of the eastern district of Virginia, Greeting:

We command you that you summon E. G. Edmunds, if he shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office in the custom-house, in the city of Richmond, in the district aforesaid, on the first
2 Monday of August next, to answer unto Robert P. Barry in a plea of trespass on the lease to his damage, as he alleges, of six thousand dollars; and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 30th day of July, A. D. 1885, and of our Independence the 110th year.

[Seal of the U. S. Circuit Court, East. Dist. of Va.]

M. F. PLEASANTS, *Clerk.*

Marshal's Return.

Executed this 31st day of July, 1885, by delivering to E. G. Edmunds, the within-named defendant, in person, a true copy of this writ, also a true copy of the declaration.

T. W. SCOTT, *Marshal.*

And on the same day, to wit, on the 30th day of July, A. D. 1885, came the plaintiff, by his attorneys, and filed his declaration in this cause, which declaration is in the words and figures following, to wit:

3 *Declaration.*

In the Circuit Court of the United States for the Eastern District of Virginia.

ROBERT P. BARRY, Plaintiff, *v.* E. G. EDMUNDS, Defendant.

Robert P. Barry, plaintiff, complains of E. G. Edmunds, defendant, of a plea of trespass on the case, for this, to wit: that the plain-

tiff is a citizen and resident of Fauquier county, Virginia; that he owns property in said county, and that he was duly and lawfully assessed with the sum of fifty-six dollars and thirty-four cents as taxes upon said property, to be paid to the State of Virginia for the year 1884; that said taxes, by the laws of said State, were not leviable for prior to the first day of December, 1884, but if not paid prior to said last-named date were leviable for after said date.

That, by a further provision of the laws of said State, if the taxes assessed for the year 1884 are not paid on or before the first day of December, 1884, the person owing the same becomes liable to pay, in addition thereto, a further sum of five per centum upon the amount of the tax so due.

4 That the plaintiff did not pay his said tax prior to the first day of December, 1884, and thereby became liable to pay an additional sum of two dollars and eighty-one cents, making the plaintiff thus liable after the 1st day of December, 1884, for the sum of ($59.15) fifty-nine dollars and fifteen cents.

That the defendant is the treasurer of Fauquier county, in the State of Virginia, and as such it is made his duty, by the laws of Virginia, to collect all taxes due to the said State by residents of said county; that in the month of June, 1885, the plaintiff tendered to the defendant, in payment of his said taxes, fifty-nine $\frac{15}{100}$ dollars, in coupons and lawful money of the United States, the two together constituting the full amount due for said taxes; that each one of the said coupons was cut from a bond issued by the State of Virginia, under the authority of the provisions of an act of her General Assembly approved March 28th, 1879, entitled "An act to provide a plan of settlement of the public debt;" that each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due to said State, and that each one was due and past maturity.

5 That the defendant refused the said coupons and money in payment of the plaintiff's taxes; that he refused to receive the same in payment of his taxes because an act of the General Assembly of the State of Virginia, approved Jan'y 26th, 1882, entitled "An act to provide for the more efficient collection of the revenue, to support government, maintain the public schools, and to pay interest upon the public debt," forbade him to receive them, and because another act of the General Assembly of said State, approved January 14th, 1882, entitled "An act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenue," likewise forbade him to receive them.

That on the — day of June, 1885, the defendant, unlawfully, maliciously, and against the will of the plaintiff, entered upon the premises of the plaintiff, situated and being in the county of Fauquier, Virginia, with force and arms, and against the will of the plaintiff, and, acting as said treasurer aforesaid, did levy on and forcibly seize and carry away valuable personal property belonging to the said plaintiff, to wit, one valuable horse, of the value of one hundred and twenty-five dollars, for the purpose of selling the same,

and thus compelling the plaintiff to pay his taxes in
6 another medium than that already offered by the plaintiff.

That on the day when the defendant so levied on the plaintiff's property, and before he did so, the plaintiff again tendered to the defendant the said coupons and money in payment of his said taxes, but the defendant refused to receive the same in payment thereof; and the plaintiff was always ready and willing up to the moment of said levy to deliver to the defendant the said coupons and money in payment of his said taxes, but the defendant always refused so to receive the same.

That the defendant levied on the plaintiff's said property and carried the same away because the 18th section of the act of the General Assembly of Virginia, approved April 1st, 1879, which is chapter 60 of the acts of the special session of 1879, commanded him so to levy upon the plaintiff's property notwithstanding said tender.

That by reason of the contract of the State of Virginia set forth upon the face of said coupons the plaintiff had a right to pay his said taxes with said coupons and money, and after he tendered the same to said treasurer his said taxes were, in point of law, paid and extinguished, and he held the said coupons and money for the
7 defendant as his agent in that behalf thereafter.

That when the defendant so levied upon and seized the plaintiff's property he knew that the Supreme Court of the United States had decided at its October term, 1884, in the case of Poindexter *vs.* Greenhow, that a tender by a tax-payer of the State's tax-receivable coupons, such as those tendered by the plaintiff in payment of taxes due the State, pays and extinguishes said tax, and that any and all laws of said State commanding her treasurers to refuse the same and commanding them to levy after said tender are repugnant to the Constitution of the United States, and are therefore null and void.

That the defendant so knowing the law levied on and seized the plaintiff's property in contempt of and defiance of the law and with the deliberate intention of defying the Constitution of the United States and the judicial powers thereof.

That there exists in the State of Virginia a very great political party, which comprises a majority of the voters in said State, which has for its aims and purpose to enact laws that will defeat and destroy the effect of the judgment of the Supreme Court of the United States in said case of Poindexter *vs.* Greenhow, and will defeat
8 and destroy the protection afforded by the Constitution of the United States to tax-payers who seek to pay their taxes with said tax-receivable coupons.

That said party, being in control of the Legislature of the said State, has enacted a great number of statutes which are intended to have that effect, and it openly proclaims that it intends to enact all other and further statutes which shall be necessary to make it impossible for tax-payers to pay their taxes with said coupons.

That the defendant is a member of said political party, and sympathises with and shares in its aims and purposes, and actively co-operates in every way in his power in every attempt to make it impossible for tax-payers to pay taxes due to said State with said coupons.

That when he refused to receive said coupons in payment of plaintiff's taxes, and when he levied on plaintiff's property as aforesaid, he did it for the purpose of aiding and assisting his said political party in its attempts to defy and nullify the Constitution of the United States.

That he intended thereby to intimidate the plaintiff and make him afraid to rely upon the Constitution of the United States and the judicial power thereof for protection in those rights guaranteed to the plaintiff by said Constitution.

9 That he intended to make an example of the plaintiff and thereby deter him and all others from relying upon the Constitution of the United States and the judicial power thereof for the protection in those rights guaranteed by the said Constitution; that in contempt of and defiance of the said Constitution and said judicial power the defendant made public advertisement in many parts of the county of Faquier that he had levied on and seized plaintiff's property because plaintiff was delinquent as a tax-payer, and that would sell the same at public auction on a day named at the court-house of said county; that on the day named he did expose the said property to sale at public auction at said court-house in the presence of many of plaintiff's neighbors, friends, and fellow-countrymen, and publicly proclaimed that plaintiff was a defaulter and delinquent tax-payer; that by reason thereof plaintiff's credit and standing were greatly injured and his feelings cruelly wounded and mortified.

That the defendant well knew when he made said levy and sale that they were forbidden by the Constitution of the United States, but he did so trusting and believing that his said political party would enact statutes of its State of Virginia that would

10 shield and protect him from all harm; that he made said levy and sale maliciously and with the purpose and intent to trample on the plaintiff's rights under the law and do him all the injury in his power.

And the said plaintiff further says that he is a citizen of Faquier county, Virginia; that he owns property in said county, and that he was duly and lawfully assessed upon said property with the sum of fifty-six dollars thirty-four cents as taxes to be paid to the State of Virginia for the year 1884, which taxes by the laws of Virginia were not leviable for prior to the 1st day of December, 1884, but the same, if not paid prior to said last-named date, were leviable for after the said date; that by a further provision of the laws of said State if the taxes assessed for the year 1884 are not paid on or before the 1st day of December, 1884, the person owing the same becomes liable to pay in addition thereto a further sum of five per centum upon the amount of the tax so due; that the plaintiff did not pay his said tax prior to the 1st day of December, 1884, and thereby became liable to pay an additional sum of $2.81, making the plaintiff thus liable after December 1st, 1884, for the sum of $59.15; that the defendant is the treasurer of Fauquier county, in the State of

11 Virginia, and as such it is made his duty, by the laws of Virginia, to collect all taxes due to the said State by residents and owners of property in said county.

That in the month of June the plaintiff tendered to the defendant, in payment of his said taxes, coupons for $—— each, and $——, in lawful money of the United States, the two together constituting the sum of $59.15. That each one of said coupons was cut from a bond issued by the State of Virginia, under the authority and provisions of an act of her General Assembly, approved March 28th, 1879, entitled "An act to provide a plan of settlement of the public debt;" that each one bore upon its face the contract of the State of Virginia; that it should be received in payment of all taxes and demands due said State, and that each one was overdue and past maturity. That the defendant refused to receive the said coupons and money in payment of the plaintiff's taxes. That he refused to receive the same in payment of his taxes, because an act of the General Assembly of the State of Virginia, approved January 26th, 1882, entitled "An act to provide for the more efficient collection of the revenue, to support government, maintain the public
12 schools, and to pay interest upon the public debt," forbade him to receive them, and because another act of the General Assembly of the State of Virginia, approved January 14th, 1882, entitled "An act to prevent fraud upon the Commonwealth and the holders of her securities in the collection of revenue," likewise forbade him to receive them. That on the —— day of June, in the year eighteen hundred and eighty-five, the defendant, unlawfully and against the will of the plaintiff, entered upon the premises of the plaintiff, situate and being in the county of Fauquier, Virginia, with force and arms, and against the will of the plaintiff, and, acting as said treasurer aforesaid, he levied on and forcibly seized and carried away valuable personal property belonging to the plaintiff, to wit: One horse, to the value of $125.00, for the purpose of selling the same and thus compelling the plaintiff to pay his taxes in another medium than that already offered by the plaintiff; that on the day when the defendant so levied on the plaintiff's property and before he did so the plaintiff again tendered to the defendant the said coupons and money in payment of said taxes, but the defendant refused to receive the same in payment thereof, and the plaintiff was always ready and willing, up to the moment of said levy,
13 to deliver to the defendant the said coupons and money in payment of his said taxes, but the defendant always refused to receive the same.

That the defendant levied on the plaintiff's said property and carrried the same away because the 18th section of the act of the General Assembly of Virginia, approved April 1st, 1879, which is chapter 60 of the acts of the special session of 1879, commanded him so to levy upon the plaintiff's property notwithstanding said tender. That by reason of the contract of the State of Virginia, set forth upon the face of said coupons, the plaintiff had a right to pay his said taxes with said coupons and money, and after he tendered the same to the said treasurer his said taxes were, in point of law, paid and extinguished, and he held the said coupons and money for the defendant as his agent in that behalf thereafter. That when the defendant so levied upon and seized the plaintiff's property he knew

that the Supreme Court of the United States had decided, at its October term, 1884, in the case of Poindexter *vs.* Greenhow, that a tender by a tax-payer of the State's tax-receivable coupons, such as those tendered by the plaintiff, in payment of taxes due the State, pays and extinguishes said tax, and that any and all laws of said State commanding her treasurer to refuse the same, and com-
14 manding them to levy after said tender are repugnant to the Constitution of the United States, and are therefore null and void.

That the defendant, so knowing the law, levied on and seized the plaintiff's property in contempt of and defiance of the law, and with the deliberate intention of defying the Constitution of the United States and the judicial power thereof.

That in contempt of and defiance of she said Constitution and judicial power the defendant made public advertisement in many parts of the county of Fauquier that he had levied on and seized plaintiff's property because plaintiff was delinquent as a tax-payer, and that he would sell the same at public auction, on a day named, at court-house, in said county. That on the day named he did expose the said property to sale at public auction, at said court-house, in the presence of many of the plaintiff's neighbors and friends and fellow-citizens and countrymen, and publicly proclaimed that the plaintiff was a defaulter and delinquent tax-payer.

That by reason thereof plaintiff's credit and standing were greatly injured, and his feelings cruelly wounded and mortified. That whilst the said defendant was unlawfully and wrongfully upon the
15 plaintiff's premises, as aforesaid, he did many other wrongs and injuries to the plaintiff of a malicious nature, by all which wrongs and injuries the plaintiff has been injured and damaged six thousand dollars. And therefore he brings his suit.

W. L. ROYALL &
SANDS & BRYAN, *P. Q.*

And at another day, to wit, at rules, held in the clerk's office of the said circuit court of the United States on the first Monday of August, A. D. 1885, came the defendant, by his attorneys, and filed his plea to the foregoing declaration, which plea is as follows, to wit:

Trespass on the Case.

In the Circuit Court of the United States for the Eastern District of Virginia.

ROBERT P. BARRY *vs.* E. G. EDMUNDS.

And the said defendant, by Brooke & Scott, his attorneys, comes and defends the wrong and injury when, &c., and says that this court ought not to have or take further cognizance of the action aforesaid, because, he says, that the said plaintiff and this de-
16 fendant are citizens of the State of Virginia and residents in Fauquier county, in said State; that the cause of action (if any exists) arose in said county, and that the circuit court of said

county, organized and constituted under the constitution and laws of the State of Virginia, has exclusive original jurisdiction to hear and determine the matter in controversy in plaintiff's declaration set forth, and that no such jurisdiction exists in this court to hear and determine the same. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

BROOKE & SCOTT, *P. D.*

E. G. Edmunds this day made oath before me, a notary public in and for the county of Fauquier, State of Virginia, that the plea hereunto annexed is true in substance and in fact to the best of his knowledge and belief.

Given under my hand, this 4th August, 1885.

C. M. WHITE,
Notary Public.

And now at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 1st day of September, A. D. 1885:

17 ROBERT P. BARRY *v.* E. G. EDMUNDS.

This cause came on this day to be considered by the court upon a motion made by the plaintiff to set a day for argument of a demurrer to the special plea filed herein. Upon consideration whereof the court is of opinion that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, for the reason that the amount of taxes due by the plaintiff to the State of Virginia was less than one hundred dollars, and the property levied on and seized by the defendant was worth less than two hundred dollars, and, therefore, that the matter in dispute in this cause does not exceed, exclusive of costs, the sum or value of five hundred dollars ($500.)

And it appearing to the court that this being an action for damages, if the jury should render a verdict for ($500) five hundred dollars damages such verdict would be excessive and the court would feel compelled to set it aside. The court is further of opinion that this court is, for that reason, also without jurisdiction of this suit.

18 The court is, therefore, for each of the aforesaid reasons, of opinion that it is required to dismiss this suit by the act of Congress approved March 3d, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes;" and this suit is accordingly hereby dismissed and stricken from the docket of the court with costs.

HUGH L. BOND,
C't Judge.

Assignment of Error.

ROBERT P. BARRY *vs.* E. G. EDMUNDS.

The plaintiff assigns for error the action of the circuit judge in dismissing his case and striking it from the docket of the court, & prays for a reversal of its judgment.

Sept. 12th, 1885.

WM. L. ROYALL,
For R. P. Barry, Plaintiff.

19 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Robert P. Barry, plaintiff, and E. G. Edmunds, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 12th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Seal United States Circuit Court, Eastern District of Virginia.

M. F. PLEASANTS,
Clerk Circ't Court of the United States for the Eas. Dist. Va.

Allowed by—
HUGH L. BOND,
Cir. Judge.

20 UNITED STATES OF AMERICA, *to wit:*

To E. G. Edmunds, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the

eastern district of Virginia, wherein Robert P. Barry is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

HUGH L. BOND,
Cir. Judge.

21 UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *To wit:*

R. P. Barry being duly sworn, on oath, deposeth and saith that on the third day of September, A. D. 1885, he duly served on E. G. Edmonds, defendant in error, the within writ (or citation), by reading the same to and leaving a true copy thereof with him.

Sworn and subscribed to before me, this 5th day of September, A. D. 1885.

C. M. WHITE,
Notary Public.

[Endorsed:] No. —. United States — court, district of Virginia. Barry *vs.* Edmunds. Citation. Original. Filed —, 186–. — Clerk.

22 Know all men by these presents that we, Wm. L. Royall and A. L. Boulware, are held and firmly bound unto E. G. Edmunds in the full and just sum of five hundred dollars, to be paid to the said Edmunds, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 12th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between Robert P. Barry, plaintiff, and E. G. Edmunds, defendant, judgment was rendered against the said Barry, and the said Barry having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edmunds citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

23 Now the condition of the above obligation is such that if the said Barry shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

WM. L. ROYALL. [SEAL.]
A. L. BOULWARE. [SEAL.]

Approved by—
HUGH L. BOND,
Circuit Judge.

UNITED STATES OF AMERICA, *Eastern District of Virginia*, } ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete copy of the record and proceedings in the cause mentioned in the caption hereof as the same remains on the files of my office.

In testimony whereof I have hereunto set my hand and the seal of said court, at Richmond, in said district, this 17th day of September, A. D. 1885.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk*.

Endorsed on cover: E. Virginia, C. C. U. S. No. 973. Robert P. Barry, plaintiff in error, *vs.* E. G. Edmunds, treasurer of Fauquier county, Virginia. Filed September 25, 1885.

Office Supreme Court U. S.
FILED.
OCT 27 1885
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

ROBERT P. BARRY
v.
E. G. EDMUNDS.
} No. 973.

Brief of Wm. L. Royall for Plaintiff in Error.

IN THE

Supreme Court of the United States.

ROBERT P. BARRY
v.
E. G. EDMUNDS. } No. 973.

Brief of Wm. L. Royall for Plaintiff in Error.

Statement of the Case.

Barry, a citizen of Virginia and resident of Fauquier county, owed the State of Virginia $59.15, for the year 1884, which was, under the laws of the State, liable to be collected by levy and sale, after December 1st, 1884. In May, 1885, he tendered the Treasurer of the State the State's tax-receivable coupons in payment of the same, which the Treasurer refused to receive, because an act of her General Assembly commanded him to refuse them. Thereafter, obeying another act of her General Assembly he levied on and seized a horse, the property of the plaintiff, which he sold publicly at the courthouse. The plaintiff sued him in the circuit court of the United States for a trespass in making this levy and sale, laying his damages at $6,000. The plaintiff in error refrains from making a more detailed statement of his case for the reason that it would be of no avail to state it more in detail without copying the entire declaration, and he prays the court to read the declaration itself for a complete statement of the claim. The declaration contains two

counts. The only difference between the counts lies in the fact that the first charges that there is a political party in the State which aims at defying and defeating the judgments and decisions of this court respecting the State's coupons; that the defendant belongs to that political party and sympathises with and shares in its aims; that the refusal of the plaintiff's coupons and the subsequent levy were made to aid his party in its purpose aforesaid; that he intended thereby to intimidate the plaintiff and deter him and all others from relying upon the Constitution of the United States and the judicial power thereof for protection in those rights which are secured to him and them by said Constitution and said power, and that he committed said trespass in full confidence that his said political party would indemnify him and hold him harmless.*

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*I pause here to remark that to one not cognizant of the actual state of affairs existing in Virginia the averments of this count may naturally seem so astounding as to appear absurd. Yet, on the day this suit was instituted, the Democratic party of the State held a convention in the city of Richmond, at which a platform for the party was adopted, which contains the following as one of its cardinal propositions:

"PUBLIC DEBT.

"The Democratic party heretofore pledged its final acceptance of the settlement of the public debt, known as the 'Riddleberger Bill,' which had then been declared constitutional by the courts, State and Federal, and its opposition to all further agitation of the question or any disturbance of that settlement, by repeal or otherwise. This pledge was observed with scrupulous fidelity on the part of our representatives by the enactment of all needful and proper measures of legislation; and the State of Virginia would have been forever freed from the harassing demands of the public creditors but for the sudden and inequitable reversal of its own decision by a Republican court, rendering still further legislation necessary for the protection of the State. *To such further legislation, and as a part thereof, to the protection and idemnification of the revenue officers of the State for all official acts done in obedience to its laws, the Democratic party pledges itself.* We appeal to the people to refuse wholly to pay any tax in coupons, and thus at once, by their own united patriotism and sovereign will, to rid the Commonwealth of this long and baneful controversy.

"The question of the State debt has ceased to be one of dollars and cents. It has become one of State sovereignty. The question is, whether the State of Virginia shall be arraigned before the Federal courts controlled by Republican judges, adjudicating upon the sovereign rights of the State in the interest of the bondholders, in defiance of one of the plainest provisions of the Federal Constitution. We appeal upon this question to all men, irrespective of party, and invite them to unite with us in defending the imperilled rights of the Commonwealth."

This document has been published in half the newspapers printed in the United

The second count has all the material averments of the first, with the exception of those relating to the political party.

At August Rules the defendant appeared, by his attorneys, and filed a special plea to the jurisdiction.

Thereupon the plaintiff moved the court to set a day for argument of a demurrer to the plea; but, upon reading the record, the court was of opinion that the cause did not come within the jurisdiction of the court, as not involving $500, and in obedience to the commands of the act of March 3d, 1875, it dismissed the suit and ordered it to be stricken from the docket. The plaintiff sued out a writ of error, and this action of the court, in dismissing his suit and ordering it to be stricken from the docket, is assigned as error.

ARGUMENT.

The learned judge who ordered the dismissal of this suit was of opinion that for a plaintiff, situated as the plaintiff in error was, to maintain an action of trespass in the Circuit Court of the United States, he must owe taxes to the amount of $500, or property of the value of $500 must be seized. He was also of opinion that if the jury should find the plaintiff's damages to be less than $500, the court could not give judgment for this smaller sum—that is, that a finding of less than $500 would defeat the jurisdiction that had already attached, by reason of the plaintiff's claim of $6,000 damages. I insist that he is radically wrong on both points.

It is settled law, as old as the hills, that in actions of tort, the plaintiff may lay his damages at whatever sum he chooses; and in courts of which the jurisdiction is limited by the amount involved in the cause, the plaintiff's claim of damages in an action of tort is the test of whether the court has jurisdiction of the suit or not. So far as the Circuit Courts of the United States are concerned, this proposition was put upon a basis that cannot be shaken. So long

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States, and it is current knowledge that it forms part of the platform of the Democratic party of Virginia.

The plaintiff well knew, when he brought his suit, astounding as it might appear, that the defendant had committed the outrage upon his rights because he knew that his political party would back him in it, and that he did it to aid his party in its party ends. His party's official action, taken at once, proved that the plaintiff knew what he was about. This count makes a case very similar to *Findlay* v. *McAllister*, 113 U. S. R. 104.

ago as 1796, in the case of *Hulescamp* v. *Teel*, 2 Dale, 358, tried before Iredell and Peters, Js., in the Pennsylvania circuit. I quote freely from the case:

"This was an action for an assault and battery committed upon the high seas, and the damages were laid in the declaration at $1,000; but the controversy being referred, the referees reported only $45 in favor of the plaintiff. In April term, 1795, *Mr. Levy*, for the defendant, obtained a rule to show cause why the report of the referees should not be quashed and the action dismissed; and the question was now argued by him on the one side, and by *Rawle* upon the other.

"The judges, though they delivered their opinions separately, concurred in the following positions as the ground of decision:

"*By the Court:* That the sum or value of the object in controversy should amount to $500, was deemed by the Legislature a reasonable limit to the jurisdiction of this court; but the law has, itself, likewise provided the remedy against any transgression of that limitation, by declaring that the plaintiff who recovers less may be adjudged to pay costs.

"The very force of the expression vests a jurisdiction; since it would be impossible to *adjudge* that the plaintiff should pay costs without taking cognizance of the cause.

"But whatever distinction might be made in other respects between suits instituted to recover a sum certain, and suits brought to recover damages for a tort, certain it is that, in the latter cases, there can be no rule to ascertain the jurisdiction of the court but the value laid in the declaration. If the finding of the jury was the criterion, then the jurisdiction of the court would depend entirely on the verdict, and if a verdict in favor of the plaintiff for less than $500 would defeat the jurisdiction, a verdict against him must unquestionably be equally fatal.

"We think, therefore, that the amount of the plaintiff's claim must be considered as the matter in dispute, and that upon a fair comparison and construction of the 11th and 20th sections of the judicial act, the mere finding of a jury, or of referees upon the question of damages, cannot affect the jurisdiction of the court."

The law that the plaintiff shall recover no costs, if he recovers less than $500, is still the same. Rev. Stat., section 968.

The case of *Wilson* v. *Daniel*, 3 Dall. 401, is also expressly in

point. In that case, Ellsworth, Chief Justice, says, at page 407, "I will repeat and explain one expression which was used in delivering the opinion of the court, and which seems to have been misunderstood.

It was not intended to say that on every such question of jurisdiction the demand of the plaintiff is alone to be regarded, but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court, and whenever the law makes a rule that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at £10,000.

The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction.

The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

In *Gordon* v. *Longest*, 16 Pet. 97, the court says:

"The damages claimed by the plaintiff in his suit give jurisdiction to the court, whether it be an original suit in the Circuit Court of the United States or brought there by petition from a State court. * * * * It has often been decided that the sum in controversy in a suit is the damages claimed in the declaration. If the plaintiff shall recover less than $500 it cannot affect the jurisdiction of the court, a greater sum having been claimed in his suit. But in such case the plaintiff does not recover his costs; and at the discretion of the court he may be adjudged to pay costs."

See also *Martin* v. *Taylor*, 1 Wash. 1; *Derr* v. *Wright*, Pet. c. c. 64; *Sherman* v. *Clark*, 3 McLean, 91; *Judson* v. *Macon County*, 2 Dill. 213.

If the learned circuit judge could say from the face of the papers that $500 was not involved in the case, then this court has no juris-

diction to review his order dismissing it. For, if he could see that less than $500 was involved, then certainly this court can see that $6,000 are not involved. But it is the settled law of this court that, for the purposes of its jurisdiction, in actions for damages, it looks to the claim of damages in the declaration alone, *when the plaintiff brings the case here.* Philipps' Practice, page 76; *Hilton* v. *Dickinson,* 108 U. S. 165.

The second reason given by the circuit judge for dismissing the case, to-wit: that it appears from the papers that a verdict for $500 would be excessive, and that the jurisdiction of the court cannot be maintained unless the plaintiffs should recover a verdict for $500, contains two erroneous propositions.

In the first place, it is not true that the recovery of a verdict for less than $500 would defeat the court's jurisdiction. As already shown by the cases of *Hulsecamp* v. *Teel*, *Wilson* v. *Daniel*, and *Gordon* v. *Longest*, in such case the jurisdiction of the court is not defeated, but the plaintiff is required to pay costs as a penalty for bringing into the Circuit Court a case that does not really involve $500.

But in the second, and most important place, the learned judge is wholly wrong in holding that the plaintiff could not on the case made by his declaration, recover $500. I insist that upon the case made by the plaintiff, he may, in the discretion of the jury, recover much more than $500.

It is too late to contend at this day that a plaintiff may not recover exemplary or punitive damages, which are to enure to the protection of the public by way of deterring all others from committing similar offences. It is the settled law of every State in this Union, and of this court also, that whenever the defendant has maliciously or wantonly and recklessly violated the plaintiff's rights, he shall be liable to him for exemplary damages; and surely no more wilful and reckless invasion of a citizen's rights could be shown than that shown by the plaintiff in this case. The first count contains matter which it is especially the duty of this court to give its attention to, and to authorize punitive damages for. But even without that matter, the second count contains evidence of such a wilful and reckless disregard of the plaintiff's rights that a jury would be authorized to award him all the damages that he claims.

In *Day* v. *Woodworth*, 13 How. 371, this court said:

"It is a well-established principle of the common law, that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages inflicted by way, of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard, and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

"In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, the courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend "on the peculiar circumstances of each case."

This doctrine met with the approbation of the court in *R. R. Co.* v. *Quigley*, 21 How. 213; *R. R. Co.* v. *Arms*, 91 U. S. R. 489.

It was evidently the learned circuit judge's opinion that the plaintiff in this case would be confined to the recovery of the amount of tax due, or to the value of the property taken. But this is not the true view of the action. This is not a suit brought to recover a tax illegally exacted or the value of a horse illegally taken. It is a suit for damages for the high-handed and unlawful act of the defendant in trampling upon the rights which the law secured to the plaintiff. The tax and the horse are mere incidents.

The plaintiff will undoubtedly be given the value of the horse taken from him, but he will be given, in addition, whatever the jury may think he ought to have to compensate him for the wanton outrage committed upon him by the defendant, and whatever it may think necessary to deter this defendant and all others from committing similar outrages.

In the case of *Merest* v. *Harvey*, 5 Taunton, 442, Gibbs, C. J., said:

"Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say 'here is a half-penny for you, which is the full extent of all the mischief I have done;' would that be a compensation? I cannot say that it would be."

WM. L. ROYALL,
For Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 973.

ROBERT P. BARRY,

Plaintiff in Error.

vs.

E. G. EDMUNDS, Treasurer of Fauquier County, Virginia.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

DANIEL H. CHAMBERLAIN,

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In error to the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The plaintiff in the Court below filed his declaration in trespass on the case, July 30, 1885, setting forth that being indebted to the State of Virginia in the sum of $56.44 for taxes for the year 1884, he tendered in payment thereof, and for the additional sum of $2.81, certain of the coupons of the bonds of said State of March 28, 1879, each by its terms receivable for taxes. That the defendant, refusing to receive the same in payment of said taxes, thereafter levied on the property of the plaintiff by forcibly entering, seizing and carrying away property of the plaintiff for the purpose of selling the same to pay said taxes, to the damage of the plaintiff $6,000, for which sum he demands judgment of the Court.

The defendant thereupon filed his plea to the jurisdiction. Thereupon on the 1st September, 1885, the said Court gave judgment dismissing said suit of the plaintiff with costs (fols. 17, 18).

To review this judgment, the present writ of error is taken.

The judgment of the Court below which appears at folios 17, 18, is placed upon the grounds (1) that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Court, because the amount of taxes involved is less than $100, and the property levied on is less in value than $200, so that the matter in dispute does not exceed, exclusive of costs, the sum of $500; (2) Because if the jury should render a verdict for damages for $500, such verdict would be excessive, and the Court would set it aside.

ARGUMENT.

I.

Prior to the Act of Congress of March 3, 1875, entitled "An Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes," the test of jurisdiction, as to the pecuniary amount involved, was the sum demanded in the declaration.

In *Hulsecamp vs. Teel*, decided in 1796, 2 Dallas, 358, the action was for an assault and battery, and the damages were laid in the declaration at $1,000. The case being referred, the Referees reported damages at $40. The defendant thereupon obtained a rule to show cause why the action should not be dismissed.

The Judges—Iredell and Peters—delivered separate opinions, not reported, but concurred in the following opinion *per curiam*.

"That the sum or value of the object in controversy should amount to $500 was deemed by the Legislature a reasonable limit to the jurisdiction of this Court; but the law has itself, likewise, provided the remedy against any transgression of that limitation by declaring that the plaintiff who recovers less may be adjudged to pay costs. The very force of the expression vests a jurisdiction, since it would be impossible to adjudge that the plaintiff should pay costs without taking cognizance of the cause.

"But whatever distinction may be made in other respects, between suits instituted to recover a sum certain, and suits brought to recover damages for a tort, certain it is that in the latter cases there

can be no rule to ascertain the jurisdiction of the Court, *but the value laid in the declaration.* If the finding of the jury was the criterion, then the jurisdiction of the Court would depend entirely on the verdict; and if a verdict in favor of the plaintiff, for less than $500, would defeat the jurisdiction, a verdict against him must unquestionably be equally fatal.

We think, therefore, that the amount of the plaintiff's claim must be considered as the matter in dispute; and that upon a fair comparison and construction of the 11th and 20th sections of the Judicial Act the mere finding of a jury, or of Referees, upon the question of damages, cannot affect the jurisdiction of the Court."

In the reporter's *note* to this case it is stated that "the following authorities were cited by Peters, Justice: "Debt, detinue, &c., will not lie for a debt under 40 shillings (2 *Inst.*, 311, 312, *Com. Dig.*). Yet, the smallness of the sum must appear on the face of the declaration (3 *Burr*, 1592; *Barnes*, 497), and though reduced by a set-off, it will not affect the jurisdiction of the Court (3 *Wils.*, 48; *Com. Dig.*, 590)" (p. 359).

The 11th section of the Judiciary Act of 1789 conferred jurisdiction on the Circuit Courts "of all suits of a civil nature, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars" (*U. S. Rev. St., Sec. 629*).

Section 12 of the same act provided that "any suit commenced in any State Court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, *to be made to appear to the satisfaction of the Court*, may be removed for trial into the Circuit Court," &c. (*U. S. Rev. St., Sec. 639*).

Section 20 of the same Act provided that "when, in a Circuit Court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value * * * he shall not be allowed, but in the discretion of the Court may be adjudged to pay costs.

U. S. Rev. St., Sec. 968.

It was here urged by counsel that the true construction of the 11th section was that the sum of $500 must be not only recoverable,

but actually recovered, exclusive of costs; and that the 12th section must be similarly construed, but the Court deliberately held, against this argument, that neither a verdict of a jury, nor a finding of a Referee, "*can affect the jurisdiction.*"

Wilson vs. Daniel, 3 Dall., 401, decided in this Court in 1798, was error to the Circuit Court of the United States for Virginia. A question of diminution of record was involved, but the second question is thus stated: "2. Whether the Supreme Court had jurisdiction of the cause, inasmuch as *the real and operative* judgment of the Circuit Court was only for $1,800, and the Judicial Act provides that there shall be no removal of a civil action from the Circuit Court into the Supreme Court unless the matter in dispute exceeds the sum or value of $2,000?"

On this question, upon the first argument, CHASE, PATERSON and CUSHING, Justices, sustained the jurisdiction; WILSON, Justice, dissented, and IREDELL, Justice, declined to take part in the decision.

On a second argument, the Chief Justice, ELLSWORTH, delivered the opinion of the Court, thus:

ELLSWORTH, Chief Justice:

2. "The second exception is that the judgment is not for a sum of sufficient magnitude to give jurisdiction to this Court. On this exception there exists a diversity of sentiment, but it is the prevailing opinion that we are not to regard the verdict or judgment as the rule for ascertaining the value of the matter in dispute between the parties. By the judicial statute it is provided that certain decisions of the Circuit Courts, in certain cases, may be reversed on a writ of error in the Supreme Court; but it is declared that the matter in dispute must exceed the sum or value of $2,000. To ascertain, then, the matter in dispute, we must recur *to the foundation of the original controversy*—to the matter in dispute when the matter was instituted. The descriptive words of the law point emphatically to this criterion; and in common understanding *the thing demanded* (as, in the present instance, the penalty of a bond) and not the thing found, constitutes the dispute between the parties.

The construction which is thus given, not only comports with every word in the law, but enables us to avoid an inconvenience which would otherwise affect the impartial administration of justice. For, if the sum, or value, found by a verdict, was considered as the

rule to ascertain the magnitude of the matter in dispute, then, wherever less than two thousand dollars was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right to a removal and revision of the cause, his demand (which is alone to govern him) being for more than two thousand dollars. It is not to be presumed that the Legislature intended to give any party such an advantage over his antagonist, and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced."

IREDELL, Justice, dissented.

"CHASE, Justice. On the first exception to this record there is no diversity of opinion; and I also agree with the majority of the Court in the decision upon the second exception, though for reasons different from those that have been assigned.

This is a question of jurisdiction; and the law vests the jurisdiction, if the matter in dispute between the parties exceeds the sum, or value, of $2,000. Whenever the objection arises on the amount of the matter in dispute, it is not, in my opinion, to be settled here, by what appears on the writ of error, *but it is to be settled in the inferior Court,* according to the circumstances appearing there, in each particular case. There is no common uniform rule that can be applied to the subject. I do not think that the demand of the plaintiff ought to be made the sole criterion; for then every plaintiff might entitle himself, in every case, to a writ of error, by laying his damages proportionally high; and I think that the amount rendered by the judgment would be found in the far greater number of cases, to be the true rule. *It must be acknowledged, however, that in actions of tort, or trespass, from the nature of the suits, the damages laid in the declaration afford the only practical test of the value of the controversy.*

Inquiring, therefore, what was in dispute in the present case, we find that the action was brought on a bond, with a condition for performing two acts, and the non-performance of both acts constitutes the breach assigned. The record is distorted by great irregularities; but every part of the pleadings, verdict and judgment, that is not conformable to the common law, I reject as not belonging to the case, which is neither founded on the statute of 8 & 9 W., 3 c., 10, nor on the act of the Assembly of Virginia. Considered, therefore, as an action at common law, the penalty is forfeited on the non-performance of either of the acts, which are the subject

of the condition. The judgment of the Court is rendered for that penalty; and though it is stated that the judgment shall be discharged on payment of a smaller sum, such a stipulation is inconsistent with the nature of a common law judgment; it must be treated as a mere surplusage; and in this view of the case, I am of opinion that the Court has jurisdiction."

"ELLSWORTH, Chief Justice. I will repeat and explain one expression which was used in delivering the opinion of the Court, and which seems to have been misunderstood.

It was not intended to say that on every such question of jurisdiction the demand of the plaintiff is alone to be regarded, but *that the value of the thing put in demand furnished the rule.* The nature of the case must certainly guide the judgment of the Court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in demand and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. *But in an action of trespass, or assault and battery, where a law prescribes no limitation as to the amount to be recovered and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand,* and presents *the only criterion* to which, from the nature of the action, we can resort in settling the question of jurisdiction.

The proposition, then, is simply this: "Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

In *Gordon vs. Longest,* 16 Pet., 97, the defendant in error brought his suit in the *State* Circuit Court of Kentucky, for the value of a slave, against the plaintiff in error, a citizen of Pennsylvania, who proceeded to remove the case to the Circuit Court of the United States, for the District of Kentucky.

The declaration claimed damages in $1,000. The State Circuit Court decided that it did not appear that the matter in dispute exceeded $500, exclusive of costs, and refused the removal.

On trial, the jury gave verdict for $650, for which judgment was entered.

Before the State Court of Appeals, the appellant assigned for error, *first,* that the State Court erred in refusing to remove the case.

The opinion of this Court was limited to this ground of error. The case was argued here by Mr. Crittenden and Mr. Benton. The former said:

"The act of Congress says that when it shall appear to the satisfaction of the Court that the sum or value in controversy exceeds five hundred dollars the cause may be removed to the Circuit Court; if the question of the amount in controversy is left to the decision of the Court exclusively, there is an end of the case for the plaintiff in error. But if it was to be settled on evidence satisfactory to the judicial eye, here was that evidence, ample and sufficient to satisfy the Judge. The damages laid in the declaration showed the claim of the plaintiff to be one thousand dollars. This was conclusive in favor of the plaintiff in error." (p. 101).

The opinion of the Court says:

"The twelfth section of the Judiciary Act of 1789 provides that, "if a suit be commenced in any State against an alien, or, by a citizen of the State, is brought against a citizen of another State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, *to be made to appear to the satisfaction of the Court*, and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such Court on the first day of its session, copies of said process against him, and also for his then appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause."

"In the declaration the plaintiff laid his damages at the sum of one thousand dollars, and this was the amount named in the writ.

"Under the above section it must be made to appear to the satisfaction of the State Court that the defendant is an alien, or a citizen of some other State than that in which suit is brought; and that the matter in controversy, exclusive of costs, exceeds the sum of five hundred dollars.

"It being admitted on the record that the defendant was a citizen of Pennsylvania, and the plaintiff, a citizen of Kentucky, the only question before the Court was the amount in dispute. *The damages claimed in the writ and declaration were, unquestionably the sum in controversy. This is not an open question.* It has been often decided, that if the plaintiff shall recover less than five hun-

dred dollars, it cannot affect the jurisdiction of the Court; a greater sum being claimed in the writ. But in such case the plaintiff does not recover his costs; and, at the discretion of the Court, he may be adjudged to pay costs.

The damages claimed by the plaintiff in his writ, gives jurisdiction to the Court whether it be an original suit in the Circuit Court of the United States, or brought here by petition from a State Court" (p. 104).

There can be doubt, therefore, that upon the authorities, the pecuniary test of jurisdiction of the Circuit Court is the amount claimed in the declaration, or complaint, or petition.

The Act of March 3, 1875, section 5, provides that if, in any suit in the Circuit Court, "*it shall appear to the satisfaction of said Circuit Court*, at any time after such suit has been brought or removed thereto, that *such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction* of said Court," * * * "the said Circuit Court shall proceed no further therein, but shall dismiss or remand it."

Supplem. to Rev. St. p. 175.

The same phrase—"*to the satisfaction of the Court*"—occurs, as we have seen, in section 12 of the Judiciary Act of 1789 (*ante*, p. 3).

The opinion of the Circuit Court (*Record*, *fols.* 17, 18) shows that this phrase, as used in the Act of 1875, was considered by that Court as giving warrant, or power, to dismiss the suit.

Two reasons are given by that Court why the suit is not "really and substantially" within its jurisdiction; *first*, because the amount of the tax being less than $100, and the property levied on being less than $200, the sum of $500 is not involved; *second*, because, if a verdict were rendered by a jury for $500, it would be excessive and would be set aside.

These are, we must believe, the considerations which, in the mind of the Court, "made it appear to its satisfaction," that the case was below the limit of its jurisdiction.

What is the force of these words: "Appear to the satisfaction of the Court?"

Certainly in *Hulsecamp vs. Teel* (*supra*) they were not held to give the right to the Court to dismiss a suit in which more than $500 was demanded in the declaration. The same is true of *Wilson vs. Daniel* (*supra*), as well as in *Gordon vs. Longest* (*supra*).

On these authorities, therefore, the phrase must have a meaning less wide or latitudinarian than that it authorizes a Court, in spite of the claim in the declaration, to dismiss a suit on this ground. If it had vested such a discretion in the Court, this Court would have looked into the grounds of the exercise of the discretion to determine whether the Court below had exercised a *legal* discretion, or an arbitrary one.

Decisions on provisions of the Code of Procedure of New York, in which a like phrase is used, are in point.

Thus the Code provides, §§ 635, 636, for a warrant of attachment against the property of defendants in an action, where the plaintiff "shows, by affidavit, *to the satisfaction of the Judge* granting the same," &c., &c.

The Courts of New York have uniformly held that, under this language, the facts must appear to the satisfaction of the Judge *acting judicially*, and that he has *no right to be satisfied except upon legal evidence.*

In *Mott vs. Lawrence*, 17 How. Pr., 560, the Court, considering this provision, said:

"It is not meant that the Justice must be *personally* satisfied, but, in the words of Chief-Justice SAVAGE, in *Smith vs. Luce*, 14 Wend., 237, he must be satisfied *judicially*, and has *no right to be satisfied unless upon legal proof.*"

To the same effect are:

Lyon vs. Baxter, N. Y. Daily Register, Feb. 3, 1883.
Steuben Co. Bank vs. Alberger, 78 N. Y., 252.
Martin vs.. Poole, 4 Hun, 638.,
Pomeroy vs. Ricketts, 27 Hun, 242.
Smith vs. Davis, 29 Hun, 306.

We take it that the Act of March 3, 1875, contemplates either a motion founded on affidavits upon which the Court can judicially act, or such developments in the course of the trial as make it ap-

parent from the evidence or from the admissions of counsel, that there never was any proper case within the jurisdiction of the Court, and that the amount of damages laid in the declaration was merely colorable.

But the words "*really and substantially involving*" are not found in former acts, but are new in the Act of 1875. What is their force?

We have good reason for thinking that a remark contained in the opinion of this Court, in *Smith vs. Greenhow*, 109 U. S., 669, though not cited, was the supposed authority for the decision here.

Smith vs. Greenhow was trespass, *vi et armis*, in the State Court, the declaration laying the damages at $6,000.

The cause was duly removed to the Circuit Court of the United States, where, on motion of the defendant, it was remanded to the State Court. To reverse this order a writ of error was prosecuted in this Court.

This Court, remarking that the ground assigned by the Court below appears to be that no Federal question was involved, holds that in this the Court below erred, and adds:

"There is a ground for remanding the cause suggested by the record, but not sufficiently apparent to justify us in resorting to it to support the action of the Circuit Court. The value of the property taken is stated in the declaration to be but $100, although the damages for the alleged trespass are laid at $6,000. The petition for removal does not allege the sum or value of the matter in dispute otherwise than by the statement of the amount of the claim for damages. We cannot, of course, assume as a matter of law that the amount laid, or a less amount, greater than $500 is not recoverable upon the case stated in the declaration, and cannot, therefore, justify the order remanding the cause on the ground that the matter in dispute does not exceed the sum or value of $500. *But if the Circuit Court had found, as matter of fact*, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of Congress, so that, in the words of the 5th Section of the Act of 1875, it appeared that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court,' the order remanding it to the State Court *could have been* sustained" (*p.* 671).

It will be seen that the suggestion here made is strictly *obiter*. But it deserves, of course, careful attention in our argument.

The Court remarks that "we cannot assume *as a matter of law*, that the amount laid, or a less amount, greater than $500 is not recoverable upon the case stated in the declaration, and cannot therefore justify the order remanding the cause, on the ground that the matter in dispute does not exceed the sum or value of $500.

Now, has not the Court below done precisely what the Court here says *cannot be done?* Has not the Court below "*assumed as a matter of law*" that an amount greater than $500 *cannot be recovered here?*

How else has that Court reached its conclusions? No facts appear except those stated in the pleadings and the record here. The Court below took no proofs whatever. It inspected the pleadings only, as is recited in its decree,—"Upon consideration whereof (that is, of a demurrer filed to the special plea) the Court is of opinion," &c. Nothing else was before the Court; nothing else could have been considered. The Court below, therefore, must have "assumed," and held, "as a matter of law," *first*, that because less than $100 of taxes was involved, and because the value of the property was less than $200, therefore the matter in dispute did not exceed $500; and, *second*, it must have "assumed as a matter of law," that no amount greater than $500 was recoverable in the case stated in the declaration," since it says that if a greater sum were awarded by the jury, the Court would "set the verdict aside."

This Court in *Smith vs. Greenhow*, further says:

But if the Circuit Court had found, *as matter of fact*, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the Act of Congress, so that, in the words of the 5th section of the Act of 1875, it appeared that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," the order remanding it to the State Court *could have been sustained*," *p.* 671.

The language here used is apparently significant: "If the Circuit Court had *found, as matter of fact*," &c.

In this case, has the Circuit "found, as matter of fact?"

In the first place, how could the Court in this case have found this *as a matter of fact?*

The record presents all there is of the case. No evidence was taken; no facts were ascertained, except as stated in the pleadings. The "finding" of the Court below, if such a term may be used at all, is a "finding," or conclusion *of law*, that as the tax is less than $100, and the property seized less than $200, *therefore* the sum of $500 is not involved.

If, then, the Court *might* have taken evidence so as to warrant or support a finding of fact, it is certain here that the Court did not do so, and hence it could not have made such a finding, and did not.

Hence, on the theory of *Smith vs. Greenhow*, there is no *finding of fact* warranting the judgment below.

The other ground stated by the Court below is still less within the doctrine of *Smith vs. Greenhow*. It is in no possible sense a finding of fact; it is merely a statement, not a finding of law or fact, but an opinion, or *dictum*, to the effect that a verdict for $500 would be excessive and subject to be set aside.

But in the present case the declaration alleges *malicious trespass*, and if malice is shown on the trial, exemplary or vindictive damages are recoverable.

1 Sedgwick on Meas. Dam., 217, and *note*.

In *Milwaukee R. R. Co. vs. Arms.*, 91 U.S., 489, this Court said: "Although, as a *general rule*, the plaintiff recovers merely indemnity, yet the doctrine is too well settled now to be shaken, that exemplary dnmages may be in certain cases assessed."

See also *Oelrichs vs. Spain*, 15 Wall., 211, 230.

The question of malice is for the jury, as well as the amount of damages, if malice be proved.

2 Sedgwick on Meas. Dam., 332; *note*, and cases there cited.

It is not incumbent on us to inquire, in what way or by what means it may be made to "appear to the satisfaction of the Court," to quote the words of the statute, or how a court may "find, as a matter of fact," to quote the statement in *Smith vs. Greenhow*, that the case, as to pecuniary limit, is not one "really and substantially"

within the jurisdiction of the Court. It is enough to say that no such *finding of fact* appears in this record.

The well-established rule, therefore, that *the amount claimed in the declaration is the pecuniary test of jurisdiction*, must prevail.

This case falls wholly within the case of *Wilson vs. Daniel* (*supra*), and the law as there stated, namely: "In an action of trespass where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and furnishes the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction" (3 *Dall.*, *p.* 407.)

The Court below, therefore, erred in dismissing the suit, and its judgment should be reversed.

D. H. Chamberlain

116-550

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IN THE

Supreme Court of the United States.

No. 973.—October Term, 1885.

ROBERT P. BARRY, Plaintiff in Error,

vs.

E. G. EDMONDS, Treasurer of Fauquier County, Virginia.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF FOR DEFENDANT IN ERROR.

JAS. V. BROOKE,

Att'y for Defendant in Error.

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In error to the Circuit Court of the United States for the Eastern District of Virginia.

Brief for Defendant in Error.

STATEMENT.

Stripped of rhetorical embellishment, the case is simply this—

The plaintiff in error was a tax-payer, resident in Fauquier County, Virginia. As such he owed the State a tax-bill, amounting to $59.15. It was not paid in money, but tendered in coupons. The treasurer of the county levied on a horse belonging to him, alleged to have been worth $125; sold the horse, retained the amount of the tax, and (it is to be presumed, as nothing is alleged to the contrary) paid the balance over to the plaintiff in error. "*Only this and nothing more.*" To redress this grievance the plaintiff in error instituted his action of trespass on

the case against said treasurer in the Circuit Court of the United States for the Eastern District of Virginia, and, upon plea to the jurisdiction, that court ordered the suit to be dismissed and stricken from its docket with costs. (Printed Record, p. 7.)

To review this judgment the present writ of error is taken. We respectfully submit that the judgment was right.

Argument.

It seems to be conceded in argument on the other side, that the Circuit Court derived its jurisdiction, if any it had, under and by virtue of the act of Congress of March 3d, 1875. See "*Carter* vs. *Greenhow*," 114 U. S. Rep., pp. 322–3, where the court, after deciding that a case like this does not come within the provisions of the 16th clause of § 629 Rev. Stat., goes on to say:

"*The mode in which Congress has legislated in aid of the "rights secured by that clause of the Constitution*" (*Art.* 1, "*sec.* 10,) "*is, as is pointed out with clearness and fulness in "the opinion of the court in the* Civil Rights Cases, (109 *U. "S.*, 3–12,) *by providing for a review on writ of error to the "judgments of the* State Courts, *in cases where they have "failed properly to give it effect, and by conferring jurisdiction "upon the Circuit Courts by the Act of March* 3, 1875, *ch.* "137, (18 *Stat.*, 470,) *of all cases arising under the Constitution "and laws of the United States where the sum or value in dis-"pute exceeds* $500. *Congress has provided no other remedy "for the enforcement of this right.*"

This suit having been instituted, not in a State Court, but in the Circuit Court of the United States, we must look to the Act of March 3d, 1875, to determine the question of jurisdiction. What are its provisions?

After enacting that the Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the

Constitution and laws of the United States, we find the following provision:

"§ 5. *That if, in any suit commenced in a Circuit Court,* "*or removed from a State Court to a Circuit Court of the* "*United States, it shall appear to the satisfaction of said Cir-* "*cuit Court, at any time after such suit has been brought or* "*removed thereto, that such suit does not* REALLY AND SUBSTAN- "TIALLY *involve a dispute or controversy properly within the* "*jurisdiction of said Circuit Court, ... the said Circuit* "*Court shall proceed no further therein, but shall dismiss the* "*suit, &c., &c.*"

It was in view of the provision of this section that the court below felt itself required to dismiss the suit, resting its decision upon two grounds, differing in form but identical in principle, viz: *First*, that the suit "did not REALLY "AND SUBSTANTIALLY involve a dispute or controversy "properly within the jurisdiction of the court," the taxes being less than $100 and the property levied on less than $200; and, *secondly*, that said suit being an action for damages, if the jury should render a verdict for $500, such verdict would be excessive and would be set aside.

It is necessary to consider in argument only the first ground of objection to jurisdiction and to enquire whether it is well taken. If it be, the second follows as a necessary consequence.

The question is simply this: "*Is the action of the court* "*below justified by a proper construction of* § 5 *of the Act of* "*March* 3, 1875, *when applied to the case as it stood.*" We respectfully insist that it is.

Public policy requires that the limitations attached to jurisdiction should be as fully respected as the jurisdiction itself. The prevention of petty and frivolous litigation, of the over-crowding of dockets, rendering it difficult for courts to deliberate or to decide with proper care, and other considerations which might be urged, were it necessary, commend the wisdom of the laws which limit jurisdiction.

In *Carter* v. *Greenhow*, the plaintiff alleged a tender of coupons for taxes, a refusal by the officer to receive them, and a seizure of the plaintiff's property for sale for the taxes, and he lays his damages at $200.

Profiting by his unfortunate experience in that case, the learned counsel for the plaintiff in error in this case changes the $200 to $6,000, and insists that he has created a jurisdiction which would not otherwise exist, although in all other respects the cases are substantially alike.

It is contended, upon the other side, that, while in actions *ex contractu*, where a certain sum is demanded in the declaration below the jurisdictional limit, the jurisdiction cannot be acquired by alleging damages beyond that limit; yet, in actions of tort, as trespass, &c., if the damages claimed are in an amount sufficient to give jurisdiction, the court is powerless to look further.

Can this be a correct view? If it is, then all limitation to jurisdiction in cases of tort are futile, and a stroke of the draftman's pen can destroy any distinction between cases where the amount in dispute is the value of a *chicken* or the value of a *reputation*.

Without reviewing the authorities cited by the other side on this point, we may venture to assert, that no case can be found, even before the statute of March 3d, 1875, in which jurisdiction was maintained upon the ground of the damages claimed, if, upon the averments of the declaration, it was manifest that they were colorable, and that the *real* and *substantial* damage, according to the averments, could not reach the amount necessary to give jurisdiction. Of course, there are cases in which the damages claimed must be regarded as the only test, as nothing but the verdict of a jury can show whether they be too high or not. Such would be the case of an action for assault and battery, for defamation of character, and the like. But, can it be gravely contended, that, where a declaration alleges the unlawful taking of a pig, of the value of $1, and nothing more, the laying of $1,000 damages

would not only give the court jurisdiction, but prevent the dismission of the suit upon an inspection of the declaration alone? We think not.

Be that as it may, the Act of March 3d, 1875, seems to have been framed with special reference to the difficulties theretofore experienced by the courts in dealing with actions of tort, when the pen of the attorney and the talismanic words "*to the damage of the plaintiff*" practically obliterated all safeguards againsts vexatious and frivolous litigation.

This is manifest in the departure from the old form. While in the 1st section it adopts the language of the 11th section of the Judiciary Act of 1789, ("*where the* "*matter in dispute exceeds, exclusive of costs, the sum or value* "*of* $500,") it provides in the 5th section that if, AT ANY TIME *after suit has been brought*, it shall appear to the satisfaction of the court, (not that the "matter in dispute" does not amount to $500, but) "*that such suit does not* "REALLY AND SUBSTANTIALLY *involve a dispute or controversy* "*properly within the jurisdiction of said Circuit Court, &c.*, "*&c.*" Does this marked change of phraseology, and this enlarged grant of discretion, mean nothing?

We submit that it means much; that, according to its provisions, the court is to determine the question of its jurisdiction, not upon the technicality of "*damages claimed*," but upon any ground that satisfies the judicial mind that they are not *really* and *substantially* demandable. And this determination may be made "AT ANY TIME AFTER SUIT "HAS BEEN BROUGHT." May not, then, the declaration furnish the basis upon which the decision is to rest? If, looking away from the mere claim of damages, it finds a case stated, according to which, in its opinion, the amount involved cannot be sufficient to give it jurisdiction, is not that the time for the judgment of dismission to be pronounced?

The learned counsel for plaintiff in error (Mr. Chamberlain) suggests that the decision of the court below was

based on what he terms an "*obiter dictum*" of the court in "*Smith vs. Greenhow*," 109 *U. S.* 669. However, this may be, as that case is the only one cited, which has been decided since the Act of March 3d, 1875, and the only one (so far as we know) in which the provisions of that act upon the point under consideration have been adverted to, it may be proper to examine it in passing.

It was an action of trespass *vi et armis* in the State court. The declaration alleged that the defendant *entered upon plaintiff's premises, took and carried away his personal property of the value of* $100, *and remained on his premises for a long time, whereby he was greatly disturbed and annoyed in the peaceable possession thereof, being his place of business, and hindered from carrying on and transacting his lawful and necessary affairs and business*, and for other wrongs and injuries, and claimed damages therefor at $6,000. The plea does not appear to have denied the allegation of damages, but rested the defence on the ground of justification. The suit was removed on petition of plaintiff to the Circuit Court of the United States. This removal does not appear to have been objected to by the defendant. The suit was docketed in the Circuit Court, and on the 4th September, 1883, was, on motion of defendant, remanded to the State court. The ground on which the remanding order was made, was that no *Federal question was necessarily involved in the issue made by the pleadings*, and it was reversed by this court for error *in that respect*. But this court adds:

"*There is a ground for remanding the cause suggested by* "*the record, but not sufficiently apparent to justify us in re-*" *sorting to it to support the action of the Circuit Court. The* "*value of the property taken is stated in the declaration to be* "*but* $100, *although the damages for the alleged trespass are* "*laid at* $6,000. THE PETITION FOR REMOVAL DOES NOT AL-" LEGE THE SUM OR VALUE OF THE MATTER IN DISPUTE OTHER-" WISE THAN BY THE STATEMENT OF THE AMOUNT OF THE " CLAIM FOR DAMAGES. *We cannot, of course, assume, as* " *matter of law, that the amount laid, or a less amount greater*

" *than* $500, *is not recoverable upon the case stated in the dec-*
" *laration and cannot therefore justify the order remanding*
" *the cause, on the ground that the matter in dispute does not*
" *exceed the sum or value of* $500. But if the Circuit Court
" had found, as matter of fact, that the amount of damages
" stated in the declaration was colorable, and had been
" laid beyond the amount of a reasonable expectation of
" recovery, for the purpose of creating a case removable
" under the act of Congress, so that, in the words of the
" 5th section of the Act of 1875, it appeared that the suit
" 'did not really and substantially involve a dispute or
" controversy properly within the jurisdiction of said Cir-
" cuit Court," the order remanding it to the State Court
" could have been sustained."

In that case the Circuit Court (which had the power to remand upon being satisfied that the suit did not *really and substantially* involve a dispute or controversy properly within the jurisdiction of said court) did not express any opinion as to the amount involved, but based its action upon another ground, which was deemed erroneous. It had first to be satisfied that the sum in dispute did not REALLY AND SUBSTANTIALLY amount to $500, and to remand on that ground, before its action could be reviewed by the appellate court, which had no power to decide *originally* upon the question, it being, as to that court, a matter of law only. " *But if the Circuit Court had found, as a matter*
" *of fact, that the amount of damages stated in the declaration*
" *was colorable, &c., &c.,*" the case would have been different.

Has not the court in this case found, " *as matter of fact*," that the damages claimed are colorable? May not the very statement of the plaintiff's declaration contain enough to show that, " as matter of fact " and not " of fiction," his damages are colorable? We do not understand this Honorable Court as deciding that there is any special rule prescribed by which the Circuit Court is to determine the question of jurisdiction, provided it keeps within the record, or that the nature of the case stated by

the plaintiff himself may not be as persuasive as any other testimony. Of course, whatever basis its opinion may rest upon, it is reviewable in this court.

And this brings us to consider the basis which it rests upon in this case.

What was the *real and substantial* damage here, if any there was? If the horse levied upon had been slaughtered and the coupons tendered taken and destroyed, the loss to the plaintiff in error would not have amounted to half the sum necessary to give the Circuit Court jurisdiction.

But no such damage was done, and the most that could be claimed is the difference between $59.15 in coupons, and $59.15 in money. And even as to this damage, the plaintiff in error voluntarily contributed. The act of the General Assembly of Virginia, passed 14th January, 1882, and which has been adjudged constitutional by this court, provided him a remedy adequate to any supposed wrong in the rejection of his coupons. (*Antoni* v. *Greenhow*, 107 U. S. 769.) This remedy the plaintiff in error rejected, and accepted the alternative of a levy. "*Hinc illæ lachrymæ.*"

It is true that the declaration, in its first count, alleges the existence of "a very great political party" in Virginia, comprising "a majority of the voters in said State, which "has for its aims and purpose to enact laws that will de- "feat and destroy the effect of the judgment of the Su- "preme Court of the United States in the case of '*Poin-* "*dexter* v. *Greenhow*;' that the defendant is a member of "that party, and sympathises with, and shares in, its aims "and purpose;" that, in refusing to receive the coupons of plaintiff, "he intended to intimidate the plaintiff and "make him afraid to rely on the Constitution of the "United States and the judicial power thereof;" that "he "intended to make an example of the plaintiff," &c., &c., and all this sensational story is rounded off with a pathetic picture of the "*wounded and mortified feelings*" of the plaintiff at having his steed advertised and sold for the taxes he owed.

We respectfully submit that it was just such a case as this that the national law-makers had in view when the Act of March 3d, 1875, was passed. They sought to provide a cure for an existing evil by authorizing the Circuit Court to *go behind* the artificial claim of damages, to tear away the tissue-veil of rhetorical pleading, and determine the matter really at issue. And so the learned judge of the court below, finding his common sense untrammeled by artificial rules, and taking judicial cognizance of self-evident facts, found no difficulty in deciding that the grand conspirators, so graphically portrayed by counsel, were, after all, but "men in buckram;" that, if the defendant was, indeed, a Virginia Democrat,* his offence was a venial one, not calling for "vindictive damages," the example having been set by Thomas Jefferson; that, so far from being a Guy Fawkes plotting the destruction of this honorable court, he was, in fact, only a quiet citizen endeavoring to do his official duty under circumstances of much embarrassment; and that much less than $500 would effectually salve over the wounds inflicted upon the feelings of the plaintiff in error, by the sale of his horse to pay his taxes.

The declaration winds up with an averment "that, whilst "the said defendant was unlawfully and wrongfully upon

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* Though emphasized in the brief of one of the learned counsel on the other side, we decline to notice *seriously* the political argument which forms the staple of the first count in plaintiff's declaration. Of course, it would have been demurred to in proper time. It is difficult to imagine what this court has to do with political parties in the State. The case of "*Findley* v. *McAllister*" furnishes no analogy. Plaintiff's counsel insist that the Democratic party of Virginia is a combined conspiracy against "*Poindexter & Greenhow.*" The opposing party in the State claims to be, "*par excellence*," the enemy of coupons and coupon-holders. If such be the attitude of affairs, the real clients of the counsel on the other side are the victims of a double conspiracy, and in as deplorable a condition as the hapless individual who is reported to have found himself "*between the devil and the deep sea.*" Any question of this kind need not to be considered by this court. The time has not come for its ermine to be soiled by contact with the slime of the political arena.

" the plaintiff's premises, as aforesaid, he did *many other* " *wrongs and injuries* to the plaintiff of a malicious nature, " *by all which wrongs and injuries* the plaintiff has been " injured and damaged $6,000." What these " *wrongs and injuries* " were, whether they were or were not connected with the levy, or independent of it, or to what extent they help to swell the aggregate damage, is not made to appear, nor even alleged. If they did not necessarily grow out of the levy, they involved no constitutional question and should be left to the State Courts, in which the plaintiff can find adequate relief, without inflicting upon the United States Courts an unnecessary burden.

Upon the whole case, we humbly submit that the Circuit Court exercised wisely and well the power vested in it by the Act of March 3, 1875, when it dismissed the plaintiff's suit. To have done otherwise would have been to establish a precedent, which would practically annul the restrictive features of that act and flood the Circuit Courts with complaints of petty grievances, the inherent insignificance of which might be successfully concealed under the artificial disguises of the special pleader.

JAS. V. BROOKE,
Attorney for Defendant in Error.

Note by Counsel for Defendant in Error.

It may be proper to state that it was the purpose of counsel for defendant in error, at the time of filing his plea to the jurisdiction of the Circuit Court, to sustain it by affidavits showing that the "*real and substantial*" damages of the plaintiff in error (if any), in the matter set forth in his declaration, were *greatly less* in amount than the sum of five hundred dollars. But on the 25th day of August, 1885, he received a letter from W. L. Royall, Esq., of counsel for plaintiff in error, suggesting a delay, and stating that he would make no motion in the case until after the first of November, 1885. To this arrangement the undersigned assented—and was, therefore, surprised to receive a citation to appear in this court, dated on the 12th September, 1885, and to find that the case had been acted on by the Circuit Court. No purpose to do anything unprofessional or improper is imputed to said counsel, but the effect has been that the case is not presented to this court in the form it would have worn, had the purpose of the defendant in error not been defeated by the unexpected action of the court. It was intended that the affidavits should indicate more clearly than the plea the exact grounds on which it rested, and, at the same time, aid the court in the exercise of the discretion vested in it by § 5 of the act of March 3d, 1875.